Supreme Court, U.S.
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No. 00-1779

In The

Supreme Court of the United States

SENEL TAYLOR, JOHNNIETTA MCGRADY, CHRISTINE SUMA, ARKELA WINSTON, and AMY HUDOCK,

Petitioners,

v.

DORIS SIMMONS-HARRIS, MARLA FRANKLIN, REV. STEVEN BEHR, SUE GATTON, MARY MURPHY, REVEREND MICHAEL DEBOSE, CHERYL DEBOSE, GLENN ALTSCHULD, and DEIDRA PEARSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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PETITIONERS' REPLY BRIEF

Respondents' opposition briefs to the petition for writ of *certiorari* concentrate almost exclusively on arguing the merits of the case, rather than presenting reasons why the petition should not be granted. They do not contest that this case presents issues of enormous public importance, that it directly impacts a promising education reform that is steadily gaining ground across the nation,[1] or that 4,000 economically disadvantaged children will be displaced from the only good schools they have ever attended if the Court does not review this case. Nor do they present any substantive response whatsoever to our second question for review, which raises the important federalism issue of whether the Sixth Circuit should have given preclusive effect to the Ohio Supreme Court decision in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), upholding the challenged school choice program on First Amendment grounds, or at least certified the question to the Ohio Supreme Court for resolution under state law.

However, respondents have called into question whether a conflict exists between the decision below and

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[1] This year alone, three new school choice programs have been enacted or expanded. Florida has made all children with disabilities eligible for vouchers to attend the public or private school of their choice. The John M. McKay Scholarships for Students with Disabilities Program, Fla. Laws ch. 82 (2001). Likewise, both Pennsylvania and Florida have enacted corporate tax credits for contributions to private scholarship funds. 2001 Pa. H.B. 996; 2001 Fla. H.B. 21.

those of other courts[2]; and between the decision below and decisions of this Court. The conflicts are plain, but we briefly reply to three arguments raised by respondents along these lines.

1. Respondents consistently argue that this case is governed by *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973) and not by subsequent cases such as *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Mitchell v. Helms*, 530 U.S. 793 (2000). In fact, the dichotomy raised by petitioners is a false one. The Court has applied the same criteria in each case, specifically (1) whether aid is directed to religious entities through the independent choices of third parties and (2) whether the aid is neutrally provided. The fact that different lower courts attempting to apply those criteria have reached different results on school choice programs[3] suggests in the strongest possible terms the need for this Court to provide direction.

2. Respondents, especially Gatton (Brief at 1 and 9), continue to premise their assault on the school choice program on the percentage of sectarian schools in the

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[2] The Gatton respondents expressly admit (Gatton Brief at 6), and the Simmons-Harris respondents tacitly concede (Simmons-Harris Brief at 21-23), a conflict between the decision below and the Wisconsin Supreme Court's decision in *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998).

[3] Those decisions are described in our petition at 10-16.

program and the proportion of children enrolled in them. Their argument, which is a linchpin of the Sixth Circuit's decision, directly contravenes this Court's precedents, which have categorically rejected a "rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401; accord, *Agostini*, 521 U.S. at 229.

Clearly the program is facially neutral. But in effect, school choice incentives in Ohio operate in favor of public and nonsectarian private schools and against religious schools. Public schools that might choose to participate in the scholarship program receive the scholarship *plus* per-pupil state aid; whereas private schools receive only the scholarship amount (capped at $2,250) (Petition at 3). Only public school students are eligible for tutorial assistance grants (*id.* at 3-4). Public and nonsectarian private schools, but not religious schools, are eligible to become community schools, which receive about twice as much in per-pupil aid (*id.* at 4). The program is neutral, and the Sixth Circuit's reliance on annual statistics relating to schools and students who have elected to participate in the program conflicts squarely with this Court's jurisprudence.

3. Because of a direct conflict between the Wisconsin Supreme Court and the Sixth Circuit on the point, the Gatton respondents (Brief at 7) make the remarkable proposition that "this Court has never analyzed the constitutionality of a school aid program by reference to options available to students under different and entirely separate programs." To the contrary, the proper constitutional framework is "the nature and consequences of the

program *viewed as a whole.*" *Witters*, 474 U.S. at 492 (Powell, J., concurring) (emphasis in original). Hence, the Court consistently has examined the surrounding context to determine whether the primary effect of a neutral assistance program is to establish religion. See, e.g., *Rosenberger*, 515 U.S. at 850 (discussing non-religious student programs receiving aid); *Zobrest*, 509 U.S. at 10 ("part of a general government program"); *Mueller*, 463 U.S. at 396 ("only one of many deductions" provided by Minnesota law).

We have described the broader context of school choices available to Cleveland children, including public magnet and community schools (Petition at 4). When viewed in the broader context of all school choices, only a small fraction of children attending schools of choice in Cleveland are enrolled in private or religious schools. If taken to its logical conclusion, respondents' argument means that this program would be constitutional if it was enacted at the same time and in the same legislation as magnet and community schools; but because it was enacted after and separately, it is unconstitutional. That makes utterly no sense either in the real world or as a matter of constitutional principle. The Sixth Circuit's holding that the program must be viewed in isolation rather than in its overall context not only creates a direct conflict with the Wisconsin Supreme Court but with this Court's holdings as well.

CONCLUSION

Respondents' arguments have only further highlighted the need for the Court to resolve the vitally important issues presented in this case. Petitioner families respectfully urge the Court to grant the Petition.

Respectfully submitted,

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